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Current Policies Allow for Enhancements to Performance Management Process

Performance Management [E-mail us](#)

Performance appraisal processes that operate outside the National Security Personnel System (NSPS) may be enhanced under the authority of existing policies. Many NSPS performance management system features are simply good management practices that are consistent with current Department of Defense (DoD) and Component policies on performance management.

For example, DoD policy requires that Component performance management programs align with organizational or mission

goals and objectives, and management processes. Understanding the linkage between organizational goals and objectives and individual performance is key to our current system, as well as to performance management under NSPS.

DoD policy also requires that Component programs communicate and clarify organizational goals and objectives to employees, and involve employees in improving organizational effectiveness. Communication and training are essential elements in the performance management process, whether

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Rhonda Diaz Assumes CPMS Senior Leadership Role

CPMS Director Brad Bunn announced the selection of Rhonda Diaz as the Executive for Business, Information, and Technology Solutions (the organization formerly known as Regionalization and Systems Modernization Division). She replaced Jan Hoffheins, who retired.

Ms. Diaz has more than 18 years of experience in HR management. In her most recent prior assignment, she directed the Office of Personnel Management (OPM) Enterprise HR Integration ([EHRI](#)), e-Government initiative, an effort that will touch every Federal agency. Under her leadership, EHRI developed a comprehensive data repository for the collection of HR, payroll, and training information across the Executive Branch and began implementation of an electronic Official Personnel Folder application to replace the current paper-based process.

For her work with EHRI, Ms. Diaz received the Federal 100 Award for 2005. This award recognizes 100 public and private sector information technology (IT) professionals for outstanding contributions to the

Government IT community. Ms. Diaz' program was also a Top 25 finalist for the Excellence.Gov Award in 2005 and the Inter-governmental Solutions Award for 2006.

Many in the DoD HR community remember Ms. Diaz from her previous accomplishments with the Strategic Integration Division and RegMod. For instance, in 2000 she was a team leader for deployment of what was then called the "Modern" Defense Civilian Personnel Data System (DCPDS), and she traveled to many installations during the conversion from legacy systems. The enterprise DCPDS now stands as the Department's HR information and transaction processing system, supporting more than 800,000 civilian employees. Ms. Diaz has also worked for the Defense Finance and Accounting Service and the Air Force.

"Ms. Diaz brings with her a wealth of experience and knowledge in the HR automation arena and will be a great addition to our senior leadership staff," Mr. Bunn said. "Please help me in welcoming Ms. Diaz back to the DoD and CPMS family."

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Performance Management Can Be Enhanced Under Current Policies

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under NSPS or the current system.

Communication can drive performance by creating shared understandings, building mutual trust and confidence, fostering greater teamwork and cooperation, and cultivating personal accountability and excellence. Various training packages available on the market can be used to provide the soft skills needed in the performance management process.

The ability for supervisors and managers to make meaningful distinctions in employee performance is already an option under current authorities. DoD policy allows Component performance programs to provide for two to five summary rating levels. It also allows for recognizing performance in the form of cash awards and quality step increases that are commensurate with the rating level.

Although current policies allow for enhancements to the performance management process, you must be mindful of labor relations obligations if changes are made for bargaining unit employees. Check your local collective bargaining agreement for applicable procedures, and consult with your local labor relations specialist before proceeding. The Field Advisory

Services Labor and Employee Relations Division is also available to provide you guidance during this process.

If you have questions, you may contact the Division by calling us at (703) 696-6301 or Defense Switched Network 426-6301, or by clicking on "E-mail us" at the beginning of this article. However, you should contact your Component HR Office for questions specific to your Component program.

Disaster Preparedness Plan Is Issued for Possible Pandemic Influenza ("Flu")

Policy & Strategy Support [E-mail us](#)

This summer, CPMS expanded the disaster preparedness and response information on our Web site at <http://www.cpms.osd.mil/disasters/>. The posted material will be updated as new issues and situations evolve.

September is National Emergency Preparedness month. Our site provides a link to very useful information on how to prepare for an emergency, both at [home](#) and at [work](#). Please pass the word to your colleagues, so they can take advantage of this.

We also recommend that DoD HR practitioners bookmark this address and familiarize themselves with it. Personnelists will then be well positioned to act in case of a health crisis like

Employee Relations [E-mail us](#)

For decades, Federal HR practitioners have understood title 5, United States Code (U.S.C.), section 7511(a)(1) to mean that individuals serving a probationary or trial period are not entitled by law to due process procedures and full appeal rights when they are separated for failure to complete that period successfully. However, judicial rulings and Merit Systems Protection Board (MSPB) decisions between 1999 and 2006 have made it increas-

ingly clear that practitioners must carefully determine whether due process and appeal rights apply in any given situation. The following discussion outlines these precedent-setting cases and their implications for the probationary period under the title 5 system.

In 1999, the U.S. Court of Appeals for the Federal Circuit issued a landmark [decision](#) in *Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144, which changed the

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pandemic flu or any other declared regional or national emergency.

Additionally, the final [installment](#) of information on planning for pandemic flu was issued to Federal agency heads on August 2nd. In her cover memorandum, OPM Director Linda M. Springer noted that, "OPM particularly appreciates the support of the Departments of Defense, Homeland Security, Labor, and Health and Human Services in the development of this guidance."

Earlier this summer, OPM issued the first two installments of information for agency use in preparing for a possible pandemic. The final installment provides the following:

- ♦ Information about overseas employees;
- ♦ Telework guidance;
- ♦ Human capital management planning guides and agency strategies;
- ♦ Employee questions and answers; and
- ♦ Employee information on pay and leave flexibilities.

The plan encompasses current HR flexibilities in leave, pay, hiring, and scheduling policies that are available to agencies and employees in dealing with a serious outbreak of contagious disease. A portion of the OPM Web site is dedicated to pandemic [flu](#) information, including an at-a-glance [overview](#) of OPM pandemic guidance to date.



Avoid Probationary Period Pitfalls; Know the Precedent Cases

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way agencies must consider probationary or trial periods when terminating an employee. Ms. Van Wersch was placed in an excepted service position under title 5, Code of Federal Regulations (CFR), Part 213.3102 (u), which allowed her to qualify for conversion to competitive status upon completing two years of satisfactory service. After serving in that position for two years and eight months without being converted to the competitive service, she was terminated. The notice advised Ms. Van Wersch that she had limited appeal rights to the MSPB, since the agency considered her to be a non-preference eligible serving a probationary period pending conversion to the competitive service.

The appeal she filed was dismissed for lack of jurisdiction by the MSPB Administrative Judge (AJ), who considered her probationary status. In response to her Petition for Review (PFR), the full Board affirmed the AJ's initial decision but remanded the appeal to address whether the agency had, in fact, converted Ms. Van Wersch to the competitive service.

The initial decision was once again affirmed when the appellant failed to establish that she had been converted to competitive service. On appeal to the Federal Circuit, Ms. Van Wersch sought review of the Board's decision that

she was not an "employee" with appeal rights under 5 U.S.C. 7511(a)(1)(C).

IT DEPENDS ON WHAT THE DEFINITION OF "OR" IS

According to that statutory provision, an employee in the excepted service (other than a preference eligible employee), is an individual:

- ♦ Who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; **or**
- ♦ Who has completed two years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to two years or less.

The Federal Circuit decided that the word "or" between 5 U.S.C. 7511(a)(1)(C)(i) and (ii) was plainly meant to be "or"—a disjunctive word used to indicate an alternative. Therefore, she qualified as an "employee," since she had completed more than two years of current continuous service in the same position. As such, she should have been afforded the full due process protections of an employee in Federal service, not the limited protections of a probationer.

In 2002, the Federal Circuit applied the interpretive changes established in *Van Wersch* to [decide](#) *McCormick v. Department of the*

Air Force, 307 F.3d 1339. Ms. McCormick completed her initial probationary period in 1992 after serving one year in a competitive service position with the Department of Health and Human Services (HHS). In 1999, she transferred to a different agency in a completely different occupation (a social worker at HHS, she became an Air Force contract negotiator). She was to serve a new probationary period in her new job, but her appointment was terminated six months later under provisions for a probationer.

DIFFERENT JOB AND AGENCY—SAME RESULT

In construing 5 U.S.C. 7511(a)(1)(C)(i) and (ii), the Federal Circuit reasoned that, since Ms. McCormick previously completed one year of Federal service without a break in service and under an appointment other than temporary, she should have been afforded the protections of an "employee." These include advance written notice, an opportunity to respond and to be represented, and a written decision with full appeal rights to the MSPB.

In a [decision](#) issued December 2, 2005, *Zambito v. Department of Homeland Security*, 100 MSPR 550, the Board dismissed the appeal for lack of jurisdiction. Mr. Zambito received an excepted service appointment on November 2, 2003, to a position as the Deputy As-

sistant Federal Security Director for Passenger Screening (Deputy AFSDPS). He had previously served as the Acting Deputy AFSDPS. On August 25, 2004, Mr. Zambito was removed during his trial period for misconduct.

WHAT IS CURRENT CONTINUOUS SERVICE?

Although he had previously completed a supervisory probationary period as a Screening Manager, his appointment to the Deputy AFSDPS position required completion of a new probationary period. The Board found that the two positions (Screening Manager and Deputy AFSDPS) had different job descriptions and qualifications, and that acting in the position prior to accepting the job permanently did not count towards completing his probationary period in the same or similar positions prior to removal.

Thus, he did not satisfy the current continuous service requirement of 5 U.S.C. 7511(a)(1) to meet the definition of "employee." Current continuous service is defined as a period of employment or service immediately preceding an adverse action in the same or similar position without a break in Federal civilian employment of a workday.

In *Gutierrez v. Department of Treasury*, 99 MSPR 141 (July 12, 2005), the Board

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MSPB Decisions Examine Non-Pay Status, Timing of Separation

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[reversed](#) the agency's termination for failure to provide the appellant her due process rights. MSPB found that she met the statutory definition of "employee."

SEASONAL ALLERGIES

On November 26, 2002, Diana Gutierrez was hired under a career-conditional appointment as a seasonal employee. Her seasonal status allowed the agency to release her to a non-pay status and recall her to duty to meet workload requirements. The agency released her to a non-pay status from September 6 until November 17, 2003. As a result, the agency argued, her service only totaled 10 months.

The OPM *Guide to Processing Personnel Actions* provides that any non-pay time in excess of 22 workdays extends the probationary period by that number of days. Ms. Gutierrez was in a non-pay status for approximately two months and nine days; hence, her probationary period should have extended beyond January 3, 2004, the effective date of her termination.

However, the Board determined that she met the requirements of an employee under 5 U.S.C. 7511(a)(1)(ii), because she served one year of current continuous service from November 26, 2002 through November 25, 2003, including the period of non-pay status. As such,

she should have been afforded due process rights.

WHAT A DIFFERENCE A DAY MAKES!

In a Board [decision](#) issued April 7, 2006, *Steinhoff v. Department of Veterans Affairs*, 2006 MSPB 72, appellant Summie Steinhoff filed a PFR after the MSPB AJ initially dismissed his appeal for lack of jurisdiction based on his probationary status. He requested a hearing, claiming that he had completed his probationary period.

On June 1, 2004, Mr. Steinhoff was appointed to a career-conditional appointment, subject to a one-year probationary period. He was

terminated effective at the close of business on May 31, 2005. The Board found that the agency did not effect his separation until the end of the appellant's tour of duty on his last day of probation, allowing him to complete his probationary period. As a result, the Board reversed the AJ and required the agency to restore the appellant to duty, since he had not been afforded due process.

SUMMARY

What is the bottom line? Clearly, it is that HR practitioners must understand the pertinent title 5 case law and correctly apply these fundamentals:

- ♦ Individuals serving a probationary period in the competitive service who have completed one year of current continuous service under other than a temporary appointment limited to one year or less have full appeal rights to the MSPB.
- ♦ Individuals in the competitive service who are terminated during the first year of their initial probationary period have limited appeal rights.
- ♦ Individuals in the excepted service who are not preference eligibles must serve two years of current continuous service under other than a temporary appointment to have full appeal rights to MSPB.

Take These Steps to Avoid Pitfalls, MSPB Staff Says

(Reprinted from *Issues of Merit*, a publication of MSPB's Office of Policy and Evaluation)

In the post-*Van Wersch* and *McCormick* world, agencies should understand that even though an individual is still serving a probationary or trial period, he may be entitled to full procedural and appeal rights if he has the requisite type and amount of Federal service. To ensure that there is a probationary or trial period that can be used to further assess the qualifications of the employee, agencies must identify—soon after an individual is hired—the type and amount of prior Federal

service the individual has. This prior service dictates when the individual obtains full procedural and appeal rights.

To make this determination, agencies should begin with any prior Federal employment history included in an appointee's resume. The accuracy of such information should have been verified through a reference check. Each appointee should also complete a Standard Form 144, Statement of Prior Federal Service. If the person is being appointed without a break in service from another Federal agency and the Official

Personnel File has not been received, agencies should obtain information by using a Standard Form 75, Request for Preliminary Employment Data. The information for completing this form may be received through a telephone call or the form may be mailed to the prior employing office.

Using these techniques, agencies can accurately compute the time they have to assess a candidate via a probationary period and, when necessary, apply the appropriate procedures to terminate the candidate based on performance or conduct deficiencies.



Completion Ceremony Honors DLAMP Participants

Defense Leadership & Management Program [E-mail us](#)

Seventy-seven participants who completed the Defense Leadership and Management Program (DLAMP) were honored at a ceremony and reception on Thursday, July 13th, in Arlington, VA. Deputy Under Secretary of Defense for Civilian Personnel Policy (DUSD(CPP)) Patricia S. Bradshaw hosted the event. The Honorable Michael L. Dominguez, who was recently confirmed as the Principal DUSD for Personnel and Readiness, gave the keynote address.

"DLAMP is playing an important role in developing the joint senior leaders the Department needs," Mr. Dominguez said. "These 77 senior Defense leaders have taken advantage of the op-

portunities available to them to learn the art of leadership. Strong leaders, both



Patricia S. Bradshaw, DUSD(CPP), congratulates Jay A. Aragon on completing DLAMP.

military and civilian, are arguably among our most valuable commodities." DLAMP is a key component of the Department's succession management strategy, preparing a cadre

of senior civilian leaders to fill critical positions now and into the future. The robust curriculum

is designed to develop highly capable senior civilian executives with a joint perspective; substantive knowledge of the national security mission; shared understanding, trust, and sense of mission with military leaders; and strong leadership and management skills. DLAMP partici-

pants at grades GS-13 through GS-15 (and equivalent) are competitively selected each year through a Component nomination process.

Generally, program requirements can be completed in two to five years, depending upon the individual's prior education, training, and experience. Requirements include a Master's degree from an accredited institution; graduate courses in business management and public policy areas, based on an individual needs assessment; foundation courses in national security studies and leadership; and Professional Military Education (senior level).

Since DLAMP's inception in 1997, a total of 428 participants have met the program's goals.

Strategic Plan: Tool for Transformation

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The Military Departments, Combatant Commands, Combat Support Agencies, and Field Support Activities have the DoD Civilian Human Capital Strategic Plan as a tool in the transformation of the civilian and total workforce. Known as the CHCSP, the Plan informs HR policies, programs, and initiatives that DoD leadership will develop in their transformation efforts. Guided by the President's Management Agenda, the Quadrennial Defense Review Report, and other directives, the Plan will help ensure that DoD is staffed with the right mix of people and skills through use of competency-focused and performance-based standards.

The CHCSP was presented at the DoD Worldwide HR Conference held July 17-20 in Southbridge, MA. Ms. Bradshaw addressed more than 350 HR managers DoD-wide and shared some of the DoD initiatives that support the goals of the Plan.

An especially important aspect of the Plan is a results-oriented accountability system to measure progress and document the status of the Department's civilian transformation efforts.

The goals of the CHCSP are as follows:

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Sick Leave Regulations Are Revised

Classification & Pay [E-mail us](#)

Government-wide sick leave regulations are being revised as part of broader [preparations](#) for possible pandemic disease. The revisions to 5 CFR Part 630 will take effect on September 18th.

Current regulations at 5 CFR 630.401 require employees to maintain at least 80 hours of sick leave in their sick leave accounts to be entitled to use up to the maximum, as follows:

- ♦ For general family care or bereavement: Up to 104 hours (i.e., 13 workdays) of sick leave; and
- ♦ For care of a family member with a serious health condition: Up to 480 hours of sick leave (i.e., 12 workweeks).

The revised regulations will abolish the requirement for employees to maintain a minimum sick leave balance in order to use the maxi-

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Strategic Plan

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- ♦ Goal 1, World-Class Leadership: The Department of Defense has diverse leaders who effectively manage people in a joint environment, ensure continuity of leadership, and sustain a learning environment that drives continuous improvement across the enterprise;
- ♦ Goal 2, Mission-Ready Workforce: The Department has a highly capable workforce characterized by agility, flexibility, diversity, and a seamless integration with the total force;
- ♦ Goal 3, Results-Oriented Performance Culture: The Department has a mission-focused, results-oriented, high-performing culture; and
- ♦ Goal 4, Enterprise HR Support: The Department's civilian HR community is strategically aligned, customer-focused, and provides measurable, leading-edge results.

The CHCSP lays the foundation for seamless integration with the total force and accountability in a results-oriented performance culture. It is a valuable tool in maintaining a competent, motivated, and mission-ready workforce. The Plan can be found online at <http://www.dod.mil/prhome/reports.html>.

Non-Foreign Overseas COLAs

September Will Bring Some Rate Changes

Classification & Pay [E-mail us](#)

New cost-of-living allowance (COLA) rates will take effect on September 1st for white-collar Federal and U.S. Postal Service employees stationed in non-foreign overseas areas. Some COLAs in Hawaii and the U.S. Virgin Islands will rise, while others in Alaska and Puerto Rico will decline by one percent. In several locations, COLAs

will remain at the current levels.

Locality pay does not apply to non-foreign overseas areas. Instead, white-collar Federal employees in these areas receive a COLA.

By law (5 U.S.C. 5941), OPM must compare costs in the COLA areas for such items as housing, utilities, transportation, and food against those in Washing-

ton, DC, and then adjust COLA rates on the basis of the relative differences. Accordingly, in areas where COLAs are being raised, living costs were found to be rising faster than in the nation's capital. Conversely, for locations where COLAs are being reduced, living costs were determined to be rising slower than in DC.

COLA survey methodology is standardized across allowance areas. For a number of years, OPM surveys showed that COLA rates should be reduced in several COLA areas, but lawsuits and legislation kept OPM from lowering them. Those have now run their course, so OPM is reducing COLAs in several areas.

"In the future, it is possible that there may be more differentiation among COLA rates than there is today," OPM noted. Any significant decreases would occur gradually, however. Under 5 CFR 591.228(c), the maximum COLA rate reduction during any 12-month period is one percent.

Rules Revised for Possible Pandemic

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maximum amount of sick leave provided for these purposes.

In response to agency comments, OPM added language at 5 CFR 630.401(f) to clarify that agencies may advance up to 30 days of sick leave for the employee's own serious disability or ailment or that of a family member, as well as for purposes related to adopting a child.

For consistency across the Federal Government, the revised regulations state that employees must provide administratively acceptable evidence or medical certification, in accordance with agency policy, within 15 calendar days or less of the agency's request. This requirement is consistent with the medical certification requirements for using leave without pay under the Fam-

ily and Medical Leave Act, as provided in the regulations at 5 CFR Part 630, Subpart L.

However, OPM noted that there may be extenuating circumstances, such as employees who cannot obtain medical certification due to the remoteness of their locations. If an employee is unable to comply within the time allotted despite diligent, good-faith efforts, under the revised regulations the individual must do so within a reasonable period of time, but no later than 30 calendar days.

Finally, the agency reporting requirements now contained in 5 CFR 630.408 are being eliminated. Agencies must still keep sufficient records to ensure that employees do not exceed their entitlement to sick leave for family care purposes.

CPMS Employment

CPMS vacancies are posted on USAJOBS. To access employment opportunities for status candidates, click [here](#).

For other CPMS vacancies, click [here](#).